

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF VIRGINIA
3 Charlottesville Division

4 ATLANTIC COAST PIPELINE, LLC., Civil No. 3:18cv00006

5 Plaintiffs,

6 vs.

Charlottesville, Virginia

7 0.07 ACRES, MORE OR LESS,
8 In NELSON COUNTY, VIRGINIA,
9 LOCATED ON PARCEL IDENTIFICATION
10 NO. 19-3-2A, and
11 FENTON FAMILY HOLDINGS, LLC.

12 Defendant.

1:50 p.m.

June 19, 2019

13 TRANSCRIPT OF MOTIONS HEARING
14 BEFORE THE HONORABLE NORMAN K. MOON
15 UNITED STATES SENIOR DISTRICT JUDGE

16 APPEARANCES:

17 For the Plaintiffs:

18 RICHARD HOLZHEIMER
19 KANG HE
20 McGuireWoods LLP
21 1750 Tysons Blvd., Suite 1800
22 Tysons Corner, VA 22102

23 For the Defendants:

24 BRIAN GERARD KUNZE
25 BLAKE WILLIS
Waldo & Lyle, P.C.
301 W. Freemason Street
Norfolk, VA 23510

26 Court Reporter:

27 Sonia Ferris, RPR, OCR
28 U.S. Court Reporter
29 116 N. Main St. Room 314
30 Harrisonburg, VA 22802
31 540.434.3181. Ext. 7

32 Proceedings recorded by mechanical stenography; transcript
33 produced by computer.

1 THE COURT: Good afternoon. We'll start going
2 through some of these motions.

3 We'll start with the plaintiff then.

4 MR. HOLZHEIMER: Thank you, Your Honor. Rick
5 Holzheimer on behalf of Atlantic Coast Pipeline. I also have
6 with me Mr. Kang He.

7 I'd like to start with the motion in limine to
8 exclude Mr. Fenton's opinions regarding the valuation of the
9 property.

10 Your Honor, on the last day of discovery, the Fenton
11 Inn supplemented their discovery responses to identify
12 Mr. Fenton as testifying as to the value of \$6.3 million,
13 approximately, for the value of the property. This is the
14 first time they had supplemented and identified him as
15 testifying as to value, and in that they had made up -- they
16 identified the various attributes that made up the
17 \$6.3 million, including \$3.1 million, approximately, to
18 reconstruct the inn; \$200,000 to reconstruct the cabin;
19 \$780,000 to do site work; \$414 million dollars -- thousand
20 dollars, approximately, for designer and architect fees; and
21 then a million dollars in potential for the property -- or
22 "future potential" was how it was identified. Your Honor,
23 we're asking that the Court strike this and we move in limine
24 the Court bar the entry of this information before the jury
25 for numerous reasons. First and foremost, Your Honor, we had

1 originally taken the deposition of the landowner entity,
2 Fenton Family Holdings, and we noticed a 30(b)(6) and
3 identified Interrogatories asking if the entity was going to
4 have anyone testifying as to the value, and in their
5 interrogatory responses, they only identified their expert,
6 Mr. Ray, and did not identify any other opinions at that
7 time. We took Mr. Fenton's deposition. He was identified as
8 a corporate designee, and identified specifically in those
9 categories for any and all information regarding the value of
10 the property, damages, and the various estimates. At that
11 time, Mr. Fenton testified that he had, quote -- not quote --
12 but in summary, on 161 of his deposition -- he said he had no
13 opinions that were separate from their expert, Mr. Ray.

14 Your Honor, in relying on that, we have prepared the
15 case and we have acted accordingly. Here on the last day of
16 discovery, the entity identified and supplemented that
17 Mr. Fenton was, for the first time, actually identifying and
18 testifying as to those. Your Honor, we believe the Court
19 should strike that. First and foremost, procedurally, and
20 under the discovery rules, and as bound by the 30(b)(6)
21 deposition that we took, timely, well before the close of
22 discovery, they did not identify and at that time -- any
23 opinions by him. At that time, he was the 30(b)(6) corporate
24 designee, who had an obligation to be prepared to testify
25 fully as to all of the facts and opinions that were noted in

1 the 30(b)(6) categories, and those categories specifically
2 included the fair market value of the property, improvements,
3 value for the easements, value for the residue, and any
4 damages. At that time, he said he did not have any opinions,
5 and we're relying on what Mr. Ray's opinions would be as
6 their expert appraiser.

7 Your Honor, supplementing something on the last day
8 of discovery after the deposition -- months after the
9 deposition -- we do not believe is fair, timely, and a
10 reasonable supplement, and we believe the Court should bar
11 that.

12 THE COURT: Under the rules, is it timely?

13 MR. HOLZHEIMER: We would argue it is not, Your
14 Honor. Under the rules, to the extent they did decide they
15 wanted to do it, they had an obligation to do it reasonably
16 and seasonably. The last day of discovery when we don't have
17 the ability to take his deposition, after we've already taken
18 his deposition -- the corporate designee was identified on
19 those topics -- and on the last day of discovery, they drop
20 that on us with a significantly larger number -- larger than
21 even their own expert at \$6.3 million -- we do not believe
22 it's timely.

23 Then, Your Honor, getting into the specific opinions,
24 we believe that the Court should still also bar --

25 THE COURT: Let me ask you this. What's the law? Is

1 that discretionary with the court or does the law permit
2 excluding that?

3 MR. HOLZHEIMER: We believe the law required them to
4 seasonably supplement also, but we think under no definition
5 is the last day of the discovery seasonably supplementing.
6 We think months after --

7 THE COURT: It's difficult when you say "you
8 believe," because I can't cite you to the Fourth Circuit. I
9 mean, is it the law or not?

10 MR. HOLZHEIMER: Ultimately, it's a discovery
11 dispute, Your Honor, and would be discretionary for the
12 court, and it's up to the court, in its discretion, as it
13 would be in a discovery dispute.

14 Moving out from the discovery and what we believe
15 would be the Court's discretion, getting into the actual
16 opinions, Your Honor, we believe the Court would also need to
17 strike them for substantive reasons. In effect, Mr. Fenton
18 is a lay witness, and in condemnation actions, lay witnesses
19 are allowed to testify as to their understanding as to the
20 value of the property. But that's subject to two things.
21 One, that it was disclosed in discovery, which it was not,
22 and that's up to the Court's discretion; and two, that is
23 just a lay opinion. They're attempting to use Mr. Fenton to
24 back-door an expert opinion through him. He's not going to
25 get up there and testify as a witness on behalf of the

1 landowner as to its understanding of the value. In the
2 supplemental Interrogatory, he's going to get up there and
3 testify and wants to testify how the inn would be
4 reconstructed, all the various costs to reconstruct it, and
5 he's also talked about the values of the materials. In order
6 to come up with his opinion, he said that he's called around
7 and talked to various suppliers, got estimates as to how much
8 are the supplies. In essence, Your Honor, he did what their
9 expert, Mr. Sarmadi, did, and the Fenton Inn is trying to
10 back-door expert testimony through Mr. Fenton. This is not
11 lay witness testimony as to value. This is expert testimony
12 that was not identified, and this, Your Honor, we don't
13 believe would be in dispute, and we don't believe is
14 discretionary. They had an obligation to identify expert
15 testimony in accordance with this Court's scheduling order.
16 This is expert testimony. He's not testifying as to his
17 belief as to the land value. He's testifying as to what it
18 would cost to reconstruct, what the materials cost, based on
19 hearsay testimony for calling around to various suppliers,
20 calling around to people as to how to build this property.
21 This, Your Honor, is purely expert testimony and it is being
22 hidden under the cover of lay witness testimony.

23 Your Honor, getting into the components of it, I
24 noted for the Court that one of the components was \$1 million
25 in future potential. This is part of the \$6.3 million that

1 he purports to want to testify before the jury. Your Honor,
2 we believe that the Court would need to strike any discussion
3 about \$1 million in future potential because in this
4 condemnation, future potential is not at issue. What is at
5 issue is the fair market value. It is the fair market value
6 on the date of take. Mr. Fenton wants to testify about,
7 Well, while the property is only worth \$5.3 million -- which
8 is in line with Mr. Ray -- he wants to add an additional
9 million dollars to the value of the property based on,
10 quote/unquote, its future potential. Your Honor, for
11 condemnation purposes, future potential is not compensable.
12 What is compensable is the value on the date of take. Any
13 discussion or testimony from Mr. Fenton about its future
14 potential or the value in the future is speculative, is not
15 allowed in the condemnation, and it would be highly
16 prejudicial for the jury to hear this when the only issue
17 before them is the fair market value on the date of take.

18 Again, getting into where this testimony comes from,
19 Mr. Fenton, as a fact witness, has said, Look, he has helped
20 build this property by his hands. He's built it and he, as
21 we've gone through the testimony -- it's cost about a million
22 dollars at the time. But now he wants to get up before the
23 jury and say, Well, I built it three years ago. At the time
24 of the fair market value on the date of take, the cost to
25 rebuild it went from \$1 million to \$3 million. For all the

1 reasons we got into why that would be speculative testimony
2 for the experts, it is highly improper and would be
3 additional speculative testimony for Mr. Fenton to testify
4 about that. Additionally, he was not identified as an expert
5 and the attempt to, again, shoehorn expert testimony through
6 him as a lay witness, we believe is improper.

7 Additionally, as I discussed earlier, Mr. Fenton's
8 testimony on these opinions are based upon hearsay. While
9 the experts can testify about their opinions based on
10 hearsay, Mr. Fenton cannot. He said, well, to determine the
11 \$3 million and to come up with the \$6.3 million valuation, he
12 called around, talked to building suppliers, talked to other
13 people, and valued the property based upon his discussions
14 with them. Again, Your Honor, this is hearsay testimony. It
15 would be highly speculative and improper for that to come in
16 for an expert, and it's directly improper for Mr. Fenton to
17 testify about that.

18 Would the Court like us to go one motion at a time?

19 THE COURT: Let's hear from the defendant.

20 MR. KUNZE: Thank you, Your Honor. May it please the
21 Court, Brian Kunze here for Fenton Family Holdings, LLC. I
22 also have with me my associate, Blake Willis, and Mr. and
23 Mrs. Fenton and their daughter.

24 I think to clarify Mr. Holzheimer's first argument
25 regarding timing of the disclosure, as Mr. Holzheimer said,

1 it was provided completely within the boundaries of the
2 discovery cutoff. What Mr. Holzheimer failed to inform the
3 Court was that not only did ACP depose Mr. Fenton in January,
4 but they also deposed him on April 9th, about two weeks after
5 the information was disclosed to ACP regarding Mr. Fenton's
6 opinion of value. So they had the opportunity to depose him.
7 We also at that time on the last day of discovery disclosed
8 additional photographs that were found in their records of
9 the property. They took the opportunity at that deposition
10 on April 9th to ask Mr. Fenton extensive questions about
11 those photographs, but for whatever reason, chose not to get
12 into the valuation opinion that Mr. Fenton provided. So any
13 claim that they had no opportunity to respond or to ask
14 Mr. Fenton questions about that is completely untrue as they
15 deposed him two weeks after that information was sent.

16 Then with regard to the nature of Mr. Fenton's
17 testimony, Your Honor, we disagree with Mr. Holzheimer's
18 contention that Mr. Fenton is a lay witness. The courts have
19 routinely held -- and we cited those in our brief, but I will
20 give the cites that -- we've cited United States v. 68.94
21 Acres of Land, which is a 1990 Third Circuit case, which
22 talks about the Federal Rules of Evidence generally
23 permitting landowners to give opinion evidence as to the
24 value of their land due to the special knowledge of property
25 which is presumed to arise out of ownership. What that means

1 and what the courts have held over the years is that owner
2 testimony is really a hybrid of 701 and 702. It's not just a
3 lay witness. It's not an expert witness, but based on their
4 specialized knowledge, they can provide opinion testimony
5 based on the value of the property. That's exactly what we
6 have here. I think Mr. Fenton is the exact type of owner
7 that these rules contemplate. He is a master carpenter and
8 designer. He built that property by himself with his bare
9 hands, harvested the materials from the property, hand-carved
10 many of the features. Did all that. So he does have that
11 specialized knowledge the Third Circuit recognized and is
12 capable and competent to testify and give opinions on the
13 value.

14 We also cited to a Tenth Circuit case, United States
15 v. 10,031.98 Acres of Land --

16 THE COURT: I don't think the -- the question is --
17 just respond to what he argued.

18 MR. KUNZE: I think the law is clear. Mr.
19 Holzheimer's argument that --

20 THE COURT: What about the potential?

21 MR. KUNZE: The potential? Certainly, Your Honor.

22 We cited to several cases that talk about it's not
23 only the value of the property on the date of take that's
24 highest and best use. For any use that is reasonably
25 probable in the future, so the highest and best use aspect --

1 THE COURT: What's the highest and best in the future
2 going to be?

3 MR. KUNZE: It's going to be that they have plans to
4 develop a wine-tasting room, do weddings, potentially a
5 restaurant, and things like that. That's the highest and
6 best use of the property, and that's what Mr. Fenton based
7 his knowledge -- as the owner based his valuation of the
8 property on. There's a litany of cases that talk about not
9 just the current use of the property, but the highest and
10 best use so long as it's not remote and speculative. That's
11 what Mr. Fenton based his valuation on. Based on the case
12 law, it's not just what's currently going on on the property,
13 but its highest and best use for any use in the future.

14 I might address the hearsay one quickly, too, Your
15 Honor. We cited to this in our brief as well, but it's been
16 recognized by the courts as well that owners enjoy the same
17 privileges as experts do as well and are able to testify to
18 hearsay as long as they have that specialized knowledge as
19 well.

20 THE COURT: Okay.

21 MR. HOLZHEIMER: Your Honor, with respect to the
22 deposition that occurred on April 9th, we did do a deposition
23 of Mr. Fenton after the close of discovery, but, Your Honor,
24 that was a specific deposition, which was actually a
25 discovery sanction for the production of materials that we

1 had to get from them. They had objected. We had to go to
2 court and, ultimately, the judge did require them to produce
3 it. Because it was being produced after the 30(b)(6)
4 deposition, the Court also authorized us to take the
5 deposition -- to reopen his deposition on limited topics.
6 Your Honor, based on those limited topics, we did issue
7 another 30(b)(6), and the limited topics that we were allowed
8 to do by the Court's order was three, which was, to the
9 extent applicable, your answers to interrogatories, your
10 responses and requests for production, and any documents
11 produced in response to the Court's order dated February 28,
12 2019. The first topic was very narrow.

13 Second topic: Fenton Inn's hazard insurance policy.
14 Again, very narrow.

15 Third topic: Receipts pertaining to the receipts of
16 the Fenton Inn. Very narrow because they didn't produce the
17 receipts previously so the Court authorized us to ask them
18 questions about what the receipts were. So while we did have
19 an opportunity to depose him after the fact, they fought us
20 and we had to fight to get these three narrow topics. So we
21 did do a deposition, Your Honor, but we weren't allowed to
22 get into anything else. These were the topics that we were
23 allowed --

24 THE COURT: Did you ask to get into any of that?

25 MR. HOLZHEIMER: He was not asked any questions

1 about --

2 THE COURT: Did you ask the magistrate judge to allow
3 that questioning?

4 MR. HOLZHEIMER: The magistrate judge's order was in
5 February. It was before the last minute supplement. So it
6 was not before the magistrate judge. It occurred a month
7 later.

8 THE COURT: Okay.

9 MR. HOLZHEIMER: So, Your Honor, we don't believe
10 that the fact there was a subsequent deposition changes the
11 unfairness and the prejudices that we have received by that
12 supplement.

13 Additionally, Your Honor, getting into the testimony
14 about whether he's going to have a winery, a tasting and
15 weddings -- these are all speculative. No experts -- Mr. Ray
16 or our expert, Mr. Harvey -- have ever testified the highest
17 and best use will include a winery or wedding venue or
18 anything like that. What it is zoned for is a bed and
19 breakfast, but they don't even meet that. It's a transient
20 lodging facility.

21 Your Honor, this actually may touch upon something we
22 get to that was identified in our pretrial submissions by
23 both parties. One of the issues we believe the Court is
24 going to need to take up before the jury is who gets to
25 decide all of these issues? As we have noted in our brief,

1 the addendum that is attached to the pretrial, it is our
2 position, and we believe the case law is absolutely clear,
3 including U.S. v. Reynolds in the Seventh Circuit, the only
4 person who is going to decide any issues other than
5 compensation is the Court. The jury can only decide one
6 issue, which is just compensation. All other factual issues
7 and all other facts would be for the trial judge. We can get
8 to that because we address that specifically later. But for
9 them to argue now that, Well, the highest and best use is now
10 a winery with wine tastings, and all these other things, Your
11 Honor -- this is just asking the jury to speculate and asking
12 the jury to make factual findings that are not within their
13 purview. We'll get to that later, but we do not believe,
14 Your Honor, that it is appropriate for the jury, and the case
15 law is clear the jury cannot consider that. The only issue
16 they're to consider is the value of what is presented and
17 this Court would decide all other issues and then present
18 that to the jury to decide. So to the extent we need to get
19 into highest and best use, larger parcel, all that stuff, we
20 believe that's only appropriate for this Court -- the
21 judge -- to rule upon.

22 THE COURT: All right.

23 Is that all on that issue?

24 MR. HOLZHEIMER: On that issue, yes.

25 THE COURT: Okay.

1 I will not allow him to testify as to potential. I
2 think that's out of the question, but I will allow him to
3 testify as to value. I don't think he's different -- even if
4 he's an expert, he's no different as to any owner of
5 property. An expert that owns property can testify as to the
6 value before and after but not to any potential. I think
7 that's in the realm of expert testimony and sort of changing
8 the highest and best use at this point. It's too late to
9 bring that up.

10 MR. HOLZHEIMER: Would the Court be open to allow us
11 to do some discovery on him at this time?

12 THE COURT: Allow what?

13 MR. HOLZHEIMER: Allow us to do his deposition on
14 those new opinions?

15 THE COURT: You don't have much time, do you?

16 MR. HOLZHEIMER: We don't, Your Honor, but I would
17 rather know than not know ahead of trial. It was produced on
18 the last day of discovery. We didn't have a chance and it
19 was after the depositions.

20 THE COURT: What do you say?

21 MR. KUNZE: Your Honor, again, we provided additional
22 information in discovery. They asked about certain
23 photographs and things like that --

24 THE COURT: Why did you wait until the last minute?
25 Seems like this is gamesmanship.

1 MR. KUNZE: It was not. Mr. Fenton was putting his
2 valuation together.

3 THE COURT: Did you tell them he was putting it
4 together?

5 MR. KUNZE: We had a discussion and they asked me if
6 Mr. Fenton was going to be providing a valuation at some
7 point. I think it was around January. I said, At this
8 point, he's not, but if he does, we'll make it available for
9 discovery.

10 THE COURT: That's misleading, with all due respect.

11 MR. KUNZE: We did not intend to mislead anybody,
12 Your Honor. We provided the information.

13 THE COURT: Okay. I'm going to exclude his testimony
14 totally. I think that's a problem.

15 What's next?

16 MR. HOLZHEIMER: Your Honor, the next issue would be
17 with respect to any evidence of sound, vibration, and light.

18 This does -- is a continuation a little bit of the
19 issue --

20 THE COURT: I don't know whether y'all saw it or not,
21 but I published an order concerning the matters beforehand
22 and -- that we heard before. Have you all seen that?

23 MR. HOLZHEIMER: We have not.

24 THE COURT: I'll tell you right now -- I'll just tell
25 you.

1 The order with regard to plaintiff's motion to
2 exclude Sarmadi is denied. Plaintiff's motion to exclude
3 opinions and testimony of Paradis is granted. Plaintiff's
4 motion to exclude the testimony of Ray is granted in part to
5 the extent his testimony and opinions are based on valuation
6 of the water and septic system on the subject property, and
7 denied in part in all other respects. Plaintiff's motion to
8 exclude the opinions and testimony of Stokes is granted.

9 MR. HOLZHEIMER: If I may take a minute to look
10 through our motions in limine and see how that affects that?

11 THE COURT: Do you want me to read that again?

12 MR. HOLZHEIMER: That would be helpful, yes.

13 THE COURT: Can we just give them a copy?

14 THE CLERK: Do you want me to print a copy? I just
15 got it right when I came to the courtroom.

16 MR. HOLZHEIMER: Your Honor, looking at our motion in
17 limine in light of the Court's order, I think it would
18 address the sound and vibration portion of our motions in
19 limine because those would relate to Paradis.

20 THE COURT: I think it does.

21 MR. HOLZHEIMER: The only thing I would raise that
22 were in the motions in limine, there's an additional report
23 in there that they had suggested they may try to get in.
24 Just like there was the sound study that was attached, there
25 was also a light study that was attached, and for the reasons

1 we think the Court ruled to keep out Paradis, we believe the
2 light study would also need to be removed.

3 MR. KUNZE: I think, Your Honor, based on the Court's
4 ruling, that would probably take care of that issue as well,
5 too.

6 THE COURT: Okay.

7 MR. HOLZHEIMER: Then, Your Honor, that would take
8 care of one motion in limine -- or two.

9 Another motion in limine, Your Honor, was with
10 respect to explosions, blasts, ruptures, incidents, and
11 testimony about fear of pipeline explosions. Your Honor, I
12 think for the same reason the Court has ruled and excluded
13 Mr. Stokes --

14 THE COURT: I think Ray can talk about people don't
15 like to be near a pipeline. I mean -- pipelines. But as far
16 as -- I think Stokes' testimony is not specific to this
17 property. It's just too speculative. But he can -- no one
18 in particular wants to be living near a pipeline, I think.

19 MR. HOLZHEIMER: We understand.

20 Mr. Ray's testimony, we believe, doesn't get into
21 that because he does reference Mr. Stokes on the explosions,
22 but Mr. Ray said his opinion was only based on his paired
23 sale, which was -- that's important in his belief that people
24 just don't want to be near it, but it had nothing to do with
25 any particular reason, nor has he found any particular reason

1 other than he believed people would not want to buy it. We
2 believe the Court would then rule similarly on the motion in
3 limine on that.

4 THE COURT: All right.

5 MR. HOLZHEIMER: Finally, Your Honor, the last motion
6 in limine from plaintiff is regarding income, revenue, and
7 profits, Your Honor.

8 There's been no claim in this case regarding lost
9 profits so we believe it would be highly prejudicial and
10 improper for Fenton Inn and Mr. Fenton to bring up lost
11 profits or concerns or claims for damages relating to income,
12 revenue or lost profits. To the extent, obviously, this
13 information is necessary for the experts, they can use that,
14 but we don't believe that Mr. Fenton or any of the landowners
15 should be able to get up there and claim to the jury that
16 they've been damaged and have lost profits when they've not
17 identified any as any of their damages.

18 THE COURT: Is there any change on lost profits?

19 MR. KUNZE: Your Honor, I was a little unclear as to
20 what they were seeking in their motion, but we have no intent
21 to put Mr. Fenton on to talk about income.

22 MR. HOLZHEIMER: Those would be our motions in
23 limine.

24 THE COURT: All right, sir.

25 MR. KUNZE: Would you like me to proceed, Your Honor?

1 THE COURT: Yes.

2 MR. KUNZE: We have essentially three motions. I'll
3 start with our motion regarding a view of the property, Your
4 Honor.

5 We've made a motion to have the jury take a view of
6 the property and --

7 THE COURT: There's no issue about that, is there?
8 Did you oppose that?

9 MR. HOLZHEIMER: We did, Your Honor. In state
10 condemnations, I would agree with Mr. Kunze that it is
11 required by statute. But -- I don't mean to take over.

12 THE COURT: That's all right. I just wanted to cut
13 it short. We try these cases pretty much the way the state
14 court does.

15 MR. KUNZE: If you'd like me to address that, Your
16 Honor, I'm happy to.

17 THE COURT: Yes; then I'll hear from him.

18 MR. KUNZE: The way the law is generally is that the
19 procedures are done in accordance with the state procedures
20 that the court is sitting. To the extent, though, 71.1 --
21 Federal Rule of Procedure 71.1 was enacted, the courts have
22 held that that generally supersedes state procedure when
23 there's a conflict between the two. However, Rule 71.1, the
24 language of the rule itself is silent on the view -- whether
25 there is a view or not. However, the advisory committee

1 notes in two specific places recognize the view. Then we've
2 cited cases -- recent cases -- in 2001, and others as well,
3 that talk about the view being an independent piece of
4 evidence that a jury can consider. Then in every other case
5 we've tried as far as the Patriot Pipeline in the Western
6 District years ago, we've done views on all of those. So in
7 this case, there's no superseding of Rule 71.1. So the
8 courts have routinely held the view is an important piece of
9 evidence for the jury to consider. There's no precedence I'm
10 aware of that ACP has cited to the contrary that says views
11 are not appropriate or anything like that. So we would just
12 ask for the jury to be able to see the property.

13 THE COURT: All right.

14 MR. HOLZHEIMER: Your Honor, as Mr. Kunze said, 71.1
15 has abrogated the reference in the Natural Gas Act and the
16 statutes and the rules referring to the state condemnation
17 procedures. We've cited numerous cases in our brief that say
18 with the enactment of 71.1 or its predecessor, 71A, that that
19 is no longer applicable in federal condemnations. So there
20 is no state procedure requirement under the rules. 71.1 is
21 very clear and every case that's addressed it says it's
22 abrogated any deference or use to state court procedures for
23 condemnations.

24 THE COURT: It looks like a view would be helpful to
25 the jury and to me.

1 MR. HOLZHEIMER: Obviously, that would be within the
2 Court's jurisdiction.

3 THE COURT: I will order a view. I think a view is
4 important.

5 MR. HOLZHEIMER: With respect to the view, then, Your
6 Honor, we believe it would be narrowly focused on the
7 property being condemned. For any viewing, we would believe
8 what would be an appropriate view would be to view the
9 property being condemned, the permanent easement area as
10 opposed to a larger site visit. The views we've done --

11 THE COURT: We're not going to hike the property.

12 MR. HOLZHEIMER: Exactly. We wouldn't want to hike
13 the property, but we think the only relevant matter for the
14 jury is the property that's actually being condemned, the
15 permanent easement area. We don't believe that a long view,
16 walking around --

17 THE COURT: We'll see about that. It's hard for me,
18 not knowing what's up there, to say what we'll view.

19 Anything else?

20 MR. KUNZE: I would just add it's not just the
21 property being condemned. Both sides' appraisers have found
22 damage to the residue of the property so to understand that,
23 I think it's necessary for the jury to see, at least, the inn
24 constructed on the property, which is right next to the
25 condemned area. We're not advocating a hike through all

1 20 acres, but the improvements that both sides valued I think
2 is necessary for the jury to see.

3 THE COURT: Okay.

4 MR. HOLZHEIMER: And, ultimately, this is within the
5 Court's discretion, but we think one issue that we do think
6 we should not be getting into is the other parcels. We get
7 into this a little bit on our pretrial addendum and filings.

8 THE COURT: I know. We've got to determine -- that's
9 an issue to come up later.

10 MR. HOLZHEIMER: Yes.

11 THE COURT: We do need -- excuse me?

12 MR. HOLZHEIMER: I was just going to say, Your Honor,
13 the unity of land issue may be an issue the Court wants to
14 take up later, but we believe it's an issue that has to be
15 taken up before the jury is seated.

16 THE COURT: We're going to talk about it a little
17 later, maybe.

18 The logistics of it, though, we'll have to set a van
19 or something to take people on the view.

20 MR. KUNZE: Yes, Your Honor.

21 One of the comments in the advisory committee's notes
22 to Rule 71.1 is that the cost and everything associated with
23 the view is borne by the condemning party.

24 MR. HOLZHEIMER: Your Honor, they're asking for the
25 view.

1 THE COURT: I'm more concerned about who takes the
2 jury out there. We did this one time before. It's been so
3 long -- I forgot whether the marshals --

4 THE CLERK: I think the marshals did it, Your Honor.

5 MR. HOLZHEIMER: Your Honor, to the extent views have
6 occurred and done a lot in state court -- normally, because
7 we're identifying the jury's valuing a specific area, the
8 permanent area that's being taken, that's what's being
9 valued -- we usually have somebody who's identified that can
10 have it staked and we can have it shown to the jury.

11 THE COURT: Okay.

12 MR. HOLZHEIMER: Does the Court logistically think --
13 will we do this next week, on Monday?

14 THE COURT: I would think it would be good if we
15 could have the view after the opening statements. We could
16 do it Tuesday morning. We don't know --

17 MR. HOLZHEIMER: We'll deal with the Court's clerk on
18 logistics.

19 THE COURT: I like to have witnesses prepared to go.
20 I usually go from 9:30 to 5. I want witnesses -- I don't
21 want to stop the case at 4 because a witness is not here.

22 MR. HOLZHEIMER: We'll be fully prepared on Monday,
23 Your Honor.

24 THE COURT: You understand.

25 MR. KUNZE: Yes, Your Honor.

1 THE COURT: We're going to have to decide, though,
2 before Monday, when the marshal is going to need to be
3 prepared to take the jury.

4 MR. KUNZE: In every case, we've done it as you've
5 suggested. We have opening statements and then proceed to
6 the view. That would be my suggestion.

7 THE COURT: I don't know how long it will take to
8 pick a jury in this case. Anyway, we'll get to that later.
9 You want to take up yours?

10 MR. KUNZE: Thank you, Your Honor.

11 Our next motion in limine, Your Honor, is to exclude
12 any evidence or testimony regarding the tax returns of both
13 the defendant, Fenton Family Holdings, LLC, and a separate
14 LLC, Fenton Inn, LLC, which is a separate LLC that operates
15 the bed and breakfast on the property.

16 Through discovery and the exhibit and witness lists,
17 we've learned that ACP intends to put on evidence of the
18 information and amounts of money reported in tax returns as a
19 basis of trying to prove a value for the property in this
20 case. As the Court has heard many times over and seen from
21 these motions, the determination of value is based on the
22 market value in this case. So our motion is to exclude tax
23 returns on the basis the information provided is strictly for
24 tax purposes and is not an indicator of actual market value.

25 THE COURT: But when you fill out your tax return,

1 you swear that the information in it is true. Why should
2 your tax return be different from your testimony and you
3 swear here that your testimony is true? If they're two
4 conflicting statements -- I mean, certainly you're not saying
5 it's all right to lie about your taxes.

6 MR. KUNZE: I'm not saying it's all right to lie
7 about taxes, Your Honor. I'm saying people file their taxes
8 in an effort to minimize tax liability, and there are
9 certain --

10 THE COURT: But still, you've got -- but you can't
11 come into court and say something because you're going to
12 maximize something else.

13 MR. KUNZE: I don't think that meets the definition
14 of market value, which is what a willing buyer and willing
15 seller will pay. What a person puts on tax returns and
16 exercises any number of rules and regulations that benefit a
17 taxpayer is not indicative of what actual market value is.

18 THE COURT: If you put on what your income was and
19 what your gross receipts were and what your expenses were --
20 should be accurate.

21 MR. KUNZE: But that's not the information that ACP's
22 experts have relied upon. They've relied upon what the LLC
23 and defendant has put on there for tax purposes and
24 depreciation as well. Even with depreciation, there are
25 rules that are not indicative of what market value is. There

1 are certain separate tax values that govern how you
2 depreciate certain items.

3 THE COURT: I understand it would be different --
4 what a tax assessment might be would be different from your
5 income.

6 MR. KUNZE: But it's not the income that their expert
7 based -- one of their rebuttal experts looked at the amount,
8 the cost to put on the tax return as that's an admission of
9 value. It's not an admission of market value. That's just
10 the raw cost incurred by the owner without certain things
11 like labor, without certain things that their appraiser
12 recognizes are elements of value, too. So it's really just
13 for tax purposes, to minimize tax liability within the
14 confines of the law. I'm not suggesting there's any kind of
15 tax fraud or anything like that going on here. But again, as
16 the courts we've cited have noted, it is not an indicator of
17 market value and that's why courts have excluded that in
18 condemnation cases, especially with regard to the value of
19 real estate.

20 ACP cites to a condemnation case out of the Second
21 Circuit, I believe, Your Honor, which talks about tax returns
22 used for the value of equipment and fixtures. But in those
23 cases, you're actually reporting the cost you paid for that.
24 That's market value. The price you paid for equipment and
25 fixtures -- that's a hard cost. That's what the market value

1 is because you had a willing buyer and seller for those. But
2 when it comes to real estate, that's not an indicator of
3 market value and that's why the courts have excluded because
4 it's not a willing buyer and seller --

5 THE COURT: What is the question and what is the
6 answer on the tax return?

7 MR. KUNZE: It's the value that was put on there for
8 the cost of materials over the years they were being
9 constructed. It's not even the final value that's been
10 reported. It's the value over the years when Mr. Fenton is
11 constructing the inn in various stages because it took him
12 several years to do it. So in 2015, he reported the value of
13 the materials and the state of the construction as one value.
14 Then the next year, it was slightly higher, and then the next
15 year, it was slightly higher than that. But that's not the
16 market value of the property. That's not indicative of what
17 the value to a willing buyer would be.

18 THE COURT: Isn't your witness saying -- he's trying
19 to get to market value by showing the cost of materials.

20 MR. KUNZE: That's the market cost of the materials
21 and that also includes labor. That also includes all the
22 type of things that go into constructing it and not just the
23 materials that Mr. Fenton bought four years before the date
24 of take. That's where the Tenth Circuit has said it's too
25 remote in time to be of any value in coming up with a market

1 value. So what Mr. Fenton put on these years before the time
2 that it was actually constructed is not indicative of what
3 the market value would be at this time or at the date of
4 take.

5 THE COURT: Is this a rebuttal witness?

6 MR. KUNZE: Yes, Your Honor.

7 I will clarify. Their appraiser relied on it to some
8 extent that that was the income generated by the property,
9 but the rebuttal witness simply looked at the tax returns and
10 the value reported on those tax returns and used that as an
11 indicator of the value of the real estate.

12 THE COURT: Okay.

13 MR. KUNZE: Thank you, Your Honor.

14 MR. HOLZHEIMER: Your Honor, the Fentons have an
15 obligation on their tax returns to identify the fair market
16 value or actual costs. They're the ones who want to get
17 into, Let's build this from scratch -- let's build this inn
18 from scratch. And to do that and for us to try and figure
19 out whether or not their valuation of \$3 million, in sum, to
20 build it from scratch is appropriate for cross-examination
21 and also for rebuttal -- we've gone through their tax returns
22 and identified the costs they've identified in their own tax
23 returns as to what it cost them to build it from scratch --
24 the cost for materials or fair market value or whatever they
25 paid for it. We believe that is directly relevant to their

1 testimony. It's directly relevant because, as the Court
2 remembers, there's multiple ways to value the property;
3 comparable sales, income approach, and then, kind of,
4 replacement costs. Their expert does one thing. He values
5 the property based on replacement costs. To do that, he has
6 cobbled together all these costs, and despite the fact that
7 we know that Mr. Fenton spent about a million dollars in
8 materials, based on his tax returns that he swore to, we
9 believe that the testimony of Mr. Ray talking about building
10 the property three years later at the cost of \$3 million is
11 completely inappropriate, and we need this information for
12 cross-examination. We need it for rebuttal, and, Your Honor,
13 we believe it's fair game when their whole testimony on
14 appraised value is building it from scratch. So when
15 Mr. Fenton identified to the IRS what he paid for these
16 materials, that's a sworn statement from him and that is a
17 statement as to the value of those materials and we have a
18 right to use that in this case when they are making the
19 materials at issue relevant for valuation purposes.

20 The Court noted in their briefs -- they cite to a lot
21 of cases. There are absolutely cases that talk about tax
22 assessments, and the cases they cite talk about tax
23 assessments. We are not getting anywhere near tax
24 assessments. We don't believe that tax assessments are
25 appropriate, nor are we offering any to the jury. But what

1 they have on the tax returns -- sworn statements -- they have
2 an obligation to be truthful and we believe are relevant and
3 should be admissible.

4 THE COURT: Okay.

5 Anything?

6 MR. KUNZE: Yes, Your Honor.

7 Again, as I explained before, many of the materials
8 used in the construction of this inn were not included in the
9 tax returns because they weren't purchased. A lot of
10 materials were purchased by Mr. Fenton from friends or not
11 paid the market value. This gets into a trial within a
12 trial, basically, as to the components of the tax return,
13 what's included in the tax return, how taxes are filed, and
14 that's basically -- nothing can come of that but confusing
15 the jury. This is about market value --

16 THE COURT: But you're talking about the cost of
17 replacement.

18 MR. KUNZE: Yes, Your Honor.

19 THE COURT: It seems to me this is a very different
20 situation than when you're talking about the other methods of
21 appraising the property.

22 MR. KUNZE: Certainly, Your Honor. It is a separate
23 type of valuation. It is based on the cost to reproduce it
24 on the date of take. Using tax returns from years prior
25 filed specifically for tax purposes is not an indicator of

1 what the value of the property was on the date of take.

2 THE COURT: But you have to be honest on your -- at
3 that. If it said what is the fair market value, what you
4 paid for it, that's the same there as it is in court.

5 MR. KUNZE: It's a value for what was purchased and
6 what was done as a result of the construction efforts to
7 date. It's not the fair market value of the property as a
8 whole. That's the difference between what's reported on the
9 tax returns.

10 THE COURT: But that's what your witness is going to
11 say -- I called around and found all these values, found what
12 it would cost to do it, and it's this much material -- and
13 that sort of thing.

14 MR. KUNZE: As of the date of take, including labor
15 and other soft costs not included in tax returns. The tax
16 returns don't include the necessary items to accurately do a
17 cost approach. Both appraisers included soft costs. Both
18 appraisers included entrepreneurial incentives. Both
19 appraisers included labor and taxes and things like that.
20 That is not included on tax returns and not required to be.

21 THE COURT: I think it's proper to use it on
22 rebuttal, and we can give the jury an instruction. If y'all
23 want to come up with a curative instruction, we'll try to do
24 it, but I don't know why it wouldn't be proper impeachment,
25 and particularly under the facts of this case.

1 What's next?

2 MR. KUNZE: We have one more.

3 Your Honor, we have a motion in limine to exclude
4 recently identified witnesses, Debbie Harvey, Charles Miller,
5 and Thomas Eick of Nelson County, who are identified on a
6 supplemental exhibit list by Atlantic Coast Pipeline on
7 June 7th -- I'm sorry, June 3rd -- which was approximately
8 six days after the deadline to identify witnesses.

9 To give you a little background on the basis of this
10 motion, Your Honor, we propounded discovery on Atlantic Coast
11 Pipeline back in August of 2013. We had Interrogatory No. 2,
12 which asked for the name, address, and identification of any
13 fact witnesses that would be called at trial. We had
14 Interrogatory No. 4, which asked for the identity of every
15 person with relevant facts known about this matter, and we
16 received only one name in response to those, which is a
17 representative from ACP, David Aman, also identified as a
18 witness on the witness list. We didn't receive any
19 notification of these potential witnesses until approximately
20 five days after --

21 THE COURT: Do you know what these witnesses are
22 testifying to?

23 MR. KUNZE: I don't, Your Honor, and that's half the
24 problem. I have an idea of what I think they're testifying
25 about and that's because we received a supplemental appraisal

1 report from Mr. Harvey, ACP's witness, and he's changed his
2 highest and best use somewhat based on a contested issue of
3 fact, which relies on, without getting into too many of the
4 details, but the number of rooms that could possibly be
5 rented at the inn based on the zoning ordinances, the
6 building permits, and certificates of occupancy. So there's
7 a contested issue of fact between the two parties on that
8 case.

9 In Mr. Harvey's second appraisal -- he didn't address
10 this in his first one, but in his second appraisal, he's now
11 changed his opinion slightly about how many rooms could be
12 built based on information he received from these three
13 identified people. He attached some emails from them and
14 some FOIA -- or documents he received from FOIA requests --
15 to the addendum of his report, but ACP never identified these
16 people in their responses to discovery as people with factual
17 knowledge or fact witnesses they intended to call at trial.
18 So they've sent subpoenas on June 7th to these three people
19 subpoenaing them as witnesses but then also directing them to
20 bring certain documents -- not only the documents that were
21 included in the addenda to Mr. Harvey's report but also any
22 other documents they have between their departments and Mr.
23 and Mrs. Fenton, the defendant. So at that point, they're
24 apparently coming to trial to talk about not only these
25 documents that relate to a material issue of fact but any

1 documents they have that we haven't been provided and have no
2 idea what they're about.

3 In addition to that, Your Honor, in their witness
4 list, even when they supplemented, at least, these peoples'
5 names, the pretrial order in this case requires them to
6 disclose the substance of their testimony. That was not
7 provided at all. All we received was their names. At this
8 point, they've given us their names and we know there are
9 these subpoenas to bring documents that we've never seen
10 before, and that's the extent of our knowledge. That's
11 happened less than three weeks before trial. So we have no
12 idea exactly of what the basis of their testimony is. They
13 say it's simply to authenticate records, but we don't know if
14 that's the case or not. And it's about a material issue of
15 fact. If they had identified these people within the
16 discovery deadline pursuant to the discovery deadline we had
17 set, we could perhaps adequately prepare --

18 THE COURT: You wouldn't take the deposition of
19 someone who's just going to authenticate a record.

20 MR. KUNZE: Well, I don't know if they're going to
21 authenticate a record or not. They've been directed to bring
22 any number of items that we've never seen before. So to the
23 extent they're going to authenticate a record --

24 THE COURT: The question is whether anything like
25 that would be admissible.

1 MR. KUNZE: I don't know what the record is so I
2 don't know.

3 THE COURT: Let's hear what they've got to say.

4 MR. HOLZHEIMER: Your Honor, with respect to the
5 identification of them, these are all custodians of records.
6 These are all people for which all we want to do is to
7 authenticate documents, to bring in documents that we've had
8 that we've produced.

9 With respect to Mr. Harvey's supplemental report, Mr.
10 Harvey supplemented his report -- absolutely -- seasonably,
11 timely, and well within discovery. He did make supplements
12 to his report. There's nothing nefarious about that. I
13 don't think there's any concern about that. But in his
14 report, Mr. Harvey has identified his value based on the
15 property and its use. We've discovered they do not have a
16 certificate of occupancy. They don't have permits for a
17 commercial kitchen. They're raising all these things. So,
18 Your Honor, these subpoenas are for rebuttal witnesses.
19 These are impeachment witnesses. I don't think there's any
20 secret. I'm going to ask Mr. Fenton: Do you have a
21 certificate of occupancy? If he says no, then I don't have
22 any need for any of these witnesses. If he, we believe,
23 would state falsely -- says yes, he has a certificate of
24 occupancy, then these witnesses are to impeach him because no
25 such certificate of occupancy exists.

1 With respect to why they should bring in all
2 documents, we're having to prove a negative. We can't ask
3 them to please bring a certificate of occupancy because it
4 doesn't exist. We tried to get certified copies of their
5 files so we wouldn't have to go through this to bring the
6 custodians here, but we've made arrangements that they can be
7 on call and not tie them up for the week. But Your Honor,
8 this really is an impeachment witness. This is classic
9 impeachment. If Mr. Fenton says they have a certificate of
10 occupancy, I have the right to impeach him, and I have the
11 right to bring impeachment witnesses on that, and that goes
12 directly to their running of this inn and their use of the
13 property on the date of take.

14 It's never had a certificate of occupancy from the
15 date they opened it to the date of take to even today.
16 There's no certificate of occupancy here, Your Honor. They
17 have a preview as to what our impeachment is going to be, but
18 for them to complain, Well, we should have identified them in
19 discovery -- we don't have to identify impeachment witnesses.
20 If he answers truthfully that they don't have a certificate
21 of occupancy, we don't have a need to call them. If he
22 answers truthfully they don't have a permit for a commercial
23 kitchen -- they talk about weddings and expanding all these
24 things, Your Honor. None of this is authorized under Nelson
25 County permitting or certificates. They have six rooms.

1 Their permits specifically say they can only have five rooms,
2 and I need to bring in the custodian of records, who will
3 authenticate those documents to the jury.

4 They've talked about, Well, we're building an
5 additional cabin that will be a pet-friendly addition. Your
6 Honor, the permits on that parcel -- it's on a different
7 parcel. It's next to the residence. And because it's next
8 to the residence, their permit is it's an inlaw suite. It
9 has nothing to do with the inn. So Mr. Fenton has this image
10 and this vision of this property, but that is not based on
11 what's based in reality, and our experts are valuing it based
12 on the date of take, based on reality, based on what's
13 reasonably probable. As it stands, they cannot have more
14 than five rooms. As it stands, it is a transient lodging
15 where the owner needs to live in the same building as the
16 rooms. So they've talked about, Oh, there's this innkeeper's
17 residence. Your Honor, there is no innkeeper residence
18 because under the zoning, the innkeeper has to live in the
19 lodge with the other rooms.

20 So he's talked about what he wanted to build.
21 Remember, Your Honor, they valued \$200,000 to build this
22 cabin that is going to be a stand-alone room. They don't
23 have a permit for more than five rooms. They already have
24 six. Then they want to argue to the jury the stand-alone
25 cabin should be valued as well. The stand-alone cabin is

1 next to the residence on a different property, and the permit
2 for it is an inlaw suite. They can't use it. So I don't
3 mean to disclose my rebuttal impeachment case, but if he
4 testifies truthfully and honestly, we don't need any of these
5 custodians of record.

6 THE COURT: Okay.

7 MR. KUNZE: Your Honor, our discovery request simply
8 asks for people with factual knowledge. We were not provided
9 that. That discovery request has been pending since August
10 of last year. The fact they've known about this -- and let
11 me respond to Mr. Holzheimer's claim that Mr. Harvey's report
12 was within the discovery deadlines. We received on --

13 THE COURT: He says it's going to be on rebuttal. He
14 can rebut your witnesses.

15 MR. KUNZE: Certainly, he can, but he also has to
16 respond to our discovery responses about people with factual
17 knowledge of the case, people who have information pertaining
18 to this matter.

19 THE COURT: Nobody takes a deposition of people who
20 just authenticate records. These people know nothing except
21 their record, I gather. That's all they'll be entitled to --

22 MR. KUNZE: He's talking about bringing them in for
23 rebuttal and impeachment purposes to say there's no
24 certificate of occupancy.

25 THE COURT: That's no different than authenticating

1 that there is a record, to say there is no record. I mean,
2 like you said -- well, it's just admissible. It's just as
3 rebuttal testimony. That's the plain --

4 MR. KUNZE: I'm not arguing, Your Honor, it's not
5 admissible. I'm arguing regarding the failure to disclose
6 the information. That's the basis of our motion.

7 THE COURT: I think it's -- I think it's proper for
8 the Court to allow notwithstanding the fact that it wasn't
9 timely filed because --

10 MR. KUNZE: Certainly, Your Honor.

11 THE COURT: Authenticating witnesses, generally, are
12 not treated the same as other fact witnesses.

13 MR. KUNZE: I don't disagree with that statement,
14 Your Honor. But the fact is that this has been a material
15 issue of fact that the parties have agreed on for several
16 months.

17 THE COURT: Does your client know that there is a
18 record there that these people say is not there?

19 MR. KUNZE: They have correspondence we've now just
20 turned over -- they've just found -- about them talking about
21 having to change certificates of occupancy and having them
22 amended and approved. They don't have a hard copy of a
23 certificate of occupancy, but we've been able to uncover
24 records.

25 THE COURT: You can explain his testimony.

1 MR. KUNZE: Thank you, Your Honor.

2 THE COURT: Anything else to exclude?

3 MR. KUNZE: No, Your Honor.

4 THE COURT: All right.

5 MR. HOLZHEIMER: I didn't know if the Court wanted to
6 take up any of the issues --

7 THE COURT: I would like to take up anything we can
8 get out of the way.

9 MR. HOLZHEIMER: Your Honor, one of the issues that I
10 think both parties have identified in the pretrial submission
11 is the issue of the unity of lands and whether or not that
12 is -- that it is a factual issue. Both of us agree the unity
13 of lands is a factual issue. Both of us agree that it is an
14 issue that's obviously vital to this case. The only
15 disagreement between the parties is who the factfinder is.
16 Your Honor, we believe the law is clear. U.S. v Reynolds and
17 also the Seventh Circuit has directly addressed this point in
18 U.S. v. 105 Acres. The only issue that goes to the jury is
19 valuing the property. The jury has no other factual issues.
20 This Court -- the judge -- is the factfinder on all other
21 factual issues. Therefore, we believe that this Court, this
22 judge, needs to determine the unity of lands issue as a
23 factual matter before the jury hears evidence.

24 Your Honor, in U.S. v. Reynolds, the Court made it
25 very clear that the judge sitting in a condemnation case

1 under 71.1 has a broader role than a judge normally does in a
2 regular jury trial. The U.S. Supreme Court specifically said
3 it is for the judge to determine all factual issues. The
4 only thing the jury is to determine is the value of the
5 property. To the extent there are factual issues that lead
6 to that, or any issues that lead to that, the judge needs to
7 determine that ahead of time.

8 Your Honor, in U.S. v. 105 Acres from the Seventh
9 Circuit, which we cited in our brief, that was exactly this
10 issue before the Seventh Circuit. In that case, the issue is
11 whether or not the parcels needed to be together, unity of
12 land or larger parcel. The Seventh Circuit reversed the
13 district court and said under U.S. v. Reynolds, that had to
14 be determined by the judge --

15 THE COURT: Is there evidence in the record already
16 the Court can decide that on?

17 MR. HOLZHEIMER: There is some evidence, but the
18 burden is on them to do it. They have not pushed or
19 presented evidence -- any evidence, we believe. They've made
20 arguments that the unity of land would apply, but as we
21 pointed out, their expert doesn't address it at all. So,
22 actually --

23 THE COURT: But his appraisal deals with the entire
24 acreage.

25 MR. HOLZHEIMER: His appraisal deals with the entire

1 acreage, but it doesn't go through any analysis on this
2 factual issue. Our appraiser did, and identified facts as to
3 why this property should not be determined under unity of
4 land. So, Your Honor, the burden is on the landowner. We,
5 as the condemnor, have condemned this one parcel. The
6 Supreme Court said anything beyond that or any issues, if you
7 want to bring in these other parcels, that may be allowed if
8 there's a determination that the larger parcel analysis was
9 done correctly, with all of the facts. This Court has not
10 had any facts before it. The Court hasn't had any evidence
11 or anything to make that determination. Until that
12 determination is made, the only parcel then is the one that
13 we have condemned. The burden is on them to bring that up to
14 get a determination from the Court, to give the Court facts
15 to make that. The Court has no facts as we sit here today.
16 So without any facts, the Court can't make that
17 determination. If they want to present facts, they can do
18 that and the Court can make that determination, but that has
19 to occur before the jury is seated -- before the jury hears
20 any evidence and, Your Honor, they have not presented those
21 facts. They have that burden and they have not done that.
22 The Supreme Court and the Seventh Circuit directly on point
23 said this court has to have an evidentiary hearing on that.
24 To the extent they want to do that, they have an obligation
25 to hold an evidentiary hearing to give the court the evidence

1 necessary to rule on that issue. They have not.

2 THE COURT: Yes, sir.

3 MR. KUNZE: Thank you, Your Honor.

4 We will concede there's a split between the circuits.
5 We cited a Fifth Circuit court that says the exact opposite
6 of what ACP is arguing today, and that is a jury decides
7 that. There's also a Southern District of California case
8 that says the opposite of that. It says it is the jury's
9 issue to decide. Regardless, we understand that there's a
10 split between the circuits and it is up to the judge's
11 discretion whether that falls into just compensation or not.
12 The issue is Rule 71.1 says the jury is the decision-maker
13 when it comes to just compensation. Just compensation is the
14 difference in value of the property before and after and
15 that's what they need to decide: What is the property
16 before, and that value; and what is the property after, and
17 that value? That's the nature of just compensation, and
18 that's for the jury to determine. That is explicitly stated
19 in Rule 71.1.

20 U.S. v. Reynolds is a case about the scope of the
21 project rule. Your Honor may remember that issue from the
22 Granby case our firm tried several years ago. That's a
23 collateral issue that doesn't go to just compensation. In
24 this case, the property before is the main bedrock of what
25 just compensation is based on and that's what the unity of

1 lands doctrine goes to. That should be an issue for the jury
2 to determine as was found by the Fifth Circuit and Southern
3 District of California. But even beyond that, Your Honor,
4 this is not an issue that needs to be determined before the
5 jury hears evidence. The Seventh Circuit case that they're
6 relying on talks about a trial occurring and evidence being
7 presented and then the judge making a determination on what
8 is the larger parcel and what is the unity of lands doctrine
9 and how that applies, and then instructing the jury
10 appropriately on it. So it is not an issue that needs to be
11 decided before the trial occurs. It is an issue for the
12 jury, but if the Court disagrees with that, it's not
13 something that needs to be decided beforehand. As the
14 Seventh Circuit has recognized, that is an issue that can be
15 determined and instructed to the jury after the evidence is
16 presented at trial.

17 That would be our position, Your Honor. ACP even
18 recognizes that in the very pretrial order that was filed
19 yesterday. If you look on page 7, subsection 6, they agree
20 it's a contested issue of law that does not require a ruling
21 before trial, which is whether the court or the jury decides
22 whether there's a unity of use between the subject property.
23 That was a joint pretrial order filed yesterday saying it's
24 not an issue to be decided before the day of trial. Several
25 hours later, they turn around and file a brief taking the

1 exact opposite position, contrary to the case law they even
2 cite.

3 Thank you, Your Honor.

4 THE COURT: Okay.

5 MR. HOLZHEIMER: Your Honor, there is not a split
6 amongst the circuit. U.S. v. Reynolds is a Supreme Court
7 case and it's very clear. And I quote, "The court tries all
8 issues, including compensation, except where a jury is
9 demanded on compensation." It goes on, "The courts have
10 interpreted all issues to include all factual issues."

11 To the extent there's a split in the circuit, which
12 we don't believe there is, in a Fourth Circuit opinion,
13 Columbia Gas v. 76 Acres that we cited in our brief, which
14 was the Fourth Circuit in 2017 -- that was a matter that I
15 argued, Your Honor. There, the Fourth Circuit said, Reverse
16 the district court because the district court erroneously
17 permitted the jury to determine a factual matter as to the
18 size of the temporary easement. Obviously, we're dealing
19 with larger parcels versus temporary easement, but this is
20 the exact same issue that came up in Columbia Gas v. 76 Acres
21 that I had to deal with, with the district court judge. The
22 judge wanted to make that a factual issue for the jury as to
23 the size and the scope of the temporary easement. We argued
24 before that court, and ultimately the Fourth Circuit said it
25 was absolutely improper to make that a factual issue for the

1 jury, and reversed the trial court. This is exactly the same
2 issue, Your Honor. The only issue that goes to the jury,
3 factual or otherwise is: What is the compensation for the
4 property? To the extent there are any other factual issues,
5 specifically unity of lands, that has to be decided by the
6 court and then once the court makes that decision, the jury
7 will be instructed as to the court's finding, and they will
8 appraise it based upon the court's finding. There's not a
9 single case that says otherwise.

10 Your Honor, if there's a split in the circuit, the
11 Fourth Circuit ruled in 2017 and reversed the district court
12 for making it a factual issue before the jury. We believe it
13 would be improper.

14 THE COURT: I don't see how, though, I could really
15 decide it without looking at the property. I mean --

16 MR. HOLZHEIMER: Your Honor, the Court could have
17 evidence and the Court can have evidence here. The factual
18 under-basis, as Mr. Harvey noted in his opinion, where he
19 went through all the reasons why human rights did not apply,
20 the Court could have an evidentiary hearing on that, and Mr.
21 Harvey has identified all the reasons why. The residence has
22 nothing to do with the house. I have an affidavit from Mr.
23 Harvey. He went out to do a site visit and he brought one of
24 his associates with him. He spent the night and his
25 associate spent the night. They had two rooms and spent the

1 night there and were supposed to do their site visit the next
2 day. The next day, they wanted to walk around and Mrs.
3 Fenton stopped them and said, No, you cannot walk around the
4 property; you can only go to places where guests go. So she
5 did not allow them to go into the kitchen, to the innkeeper
6 space in the basement or to anywhere else. And importantly,
7 she would not allow them to go on to the other two parcels.
8 And I have affidavits I can give to the Court. She said the
9 other two parcels, guests are not allowed to go there; and,
10 in fact, in his affidavit, he noted they had a pipe gate that
11 was closed to the driveway to the other two parcels and she
12 told him, You are not allowed to go past that pipe gate and
13 you are not allowed to go to the other two parcels.

14 The Court can have an evidentiary hearing. This is
15 an admission from Mrs. Fenton. She said, You cannot go onto
16 the property. You can only go where guests go. When Mr.
17 Harvey was there, that was only in the inn. If the Court
18 wants to have an evidentiary hearing, we can present that
19 evidence to the Court and they can present whatever evidence
20 they have on that issue. But the burden is on them. If they
21 do not meet that burden, then the unity of lands fails.

22 THE COURT: Okay. Anything?

23 MR. KUNZE: I'm not sure, Your Honor, what the
24 relevance is of the parts of the property that Mr. Harvey
25 inspected or not. I've not seen these affidavits that Mr.

1 Holzheimer has referenced and I'm not aware of what his
2 claims are at this point. But that has nothing to do with
3 the legal issue before the Court now as to whether there
4 needs to be an evidentiary hearing before the trial occurs.
5 In the Fifth Circuit case they cite, described the fact a
6 trial was held, and then the Court, based on the evidence
7 presented at trial, made a determination as to whether the
8 larger parcel portion, unity of lands doctrine applied. So
9 there's no support for the fact some sort of evidentiary
10 hearing needed to occur prior to any type of trial happening.

11 The difference between interpretations of what
12 happened at the site view Mr. Harvey attended, I'm not aware
13 of. I haven't seen these affidavits. But if they wanted to
14 request additional views, they could have done that and that
15 would have been proper. But that has nothing to do with the
16 legal question of whether there needs to be an evidentiary
17 hearing prior to this, and none of the courts have said
18 that's required. So that's really the issue before the Court
19 now, whether the larger parcel theory applies and when that
20 determination is made, and there's absolutely no precedence
21 or requirements that an evidentiary hearing occurs. In fact,
22 to the contrary. The case law says it doesn't occur prior to
23 trial.

24 THE COURT: What about the Fourth Circuit case he
25 cites saying the judge has to --

1 MR. KUNZE: That's the size of the easement, Your
2 Honor. I wholeheartedly concede that that's not an issue of
3 just compensation or a determination of just compensation.
4 That's a factual issue outside of that. That's covered under
5 Rule 71.1. The value of the property before is part of the
6 just compensation and that's what the parties are arguing
7 over. What is the value of the property for? They say the
8 value of the property before only includes the one parcel and
9 the inn building. Our expert says the property before
10 includes all three parcels. That's the bedrock, the basis
11 for just compensation. If you don't have the value of the
12 property before, you can't calculate what just compensation
13 is. There's nothing else that can be included in that other
14 than the value before and the value after and the difference
15 between the just compensation.

16 Regardless of whether the Court rules the jury
17 determines that or the Court makes that finding, there's no
18 requirement that occur before trial happens.

19 MR. HOLZHEIMER: As a practical matter, Your Honor,
20 it has to occur before the jury hears evidence because the
21 valuation of the property is based on -- is it 2.9 acres or
22 is it 20 acres? It's very analogous to the Columbia Gas
23 case, which the Fourth Circuit ruled on. There, it said,
24 "The district court erroneously permitted the jury to
25 determine a factual matter, the size of the temporary

1 easements."

2 Here, what they want to argue is to make the jury
3 determine the factual issue of the size of the parcel at
4 issue, whether it's 2.9 acres or 20 acres. It's very
5 analogous to what the Fourth Circuit correctly ruled on and
6 said that is improper for the jury to decide that.

7 So as a practical matter, are there cases that say
8 the Court needs to determine this before trial? I'm not
9 going to say there's not a case on it, but there's no way
10 either side can present evidence to this jury as to the fair
11 market value of the property when we can't even start with
12 what's the size of the property we're valuing. Is it 3
13 acres, 2.9 acres, or 20? So how can the jury understand when
14 they hear Harvey value 2.9 acres, and they hear Ray say it's
15 20 acres? And they'll have to figure out which property, how
16 big it is, and they'll be asked to make this exact same issue
17 the court did in Columbia Gas that the Fourth Circuit said is
18 improper. So is there a case that says the Court needs to
19 have it? No. But there's no practical way this jury could
20 hear evidence about fair market value --

21 THE COURT: They could give opinions. If it's one
22 parcel, my opinion is this, and if it's two or three, my
23 opinion is something else.

24 MR. HOLZHEIMER: Your Honor, this is getting very
25 confusing for a jury.

1 THE COURT: I know, but we're up on the date of the
2 trial. There's not a lot of time.

3 MR. HOLZHEIMER: We are up on the date of trial.
4 That's why this issue has come up. The burden is on them to
5 raise this issue, factually. The burden is on them on all of
6 these issues, on valuation. So we've prodded them --

7 THE COURT: They say it's the whole property.

8 MR. HOLZHEIMER: They presented no evidence, though,
9 for this Court to make that determination, and there's no
10 evidence, nor should they present any evidence to make that
11 determination either. And the jury shouldn't have to hear
12 multiple valuation scenarios and hypotheticals because it's
13 not just the size of the property but gets into: Is the
14 residence and inlaw suite on the residence included as part
15 of the inn? If the jury hears this and has to create
16 hypothetical verdicts, it's going to be confusing --

17 THE COURT: I'm not talking about hypothetical
18 verdicts. The experts could give -- Ray would give his
19 opinion, and I suppose you would ask, Well, if it's not
20 20 acres, but only the one parcel, what would your opinion
21 be?

22 MR. HOLZHEIMER: We can do that, Your Honor, but I
23 fear it will be very confusing for the jury versus -- again,
24 there's no direct law as to how the Court should do this, but
25 I think, as a practical matter, it would be confusing to the

1 jury versus --

2 THE COURT: If the Court is supposed to make the
3 determination, it would be, as a practical matter, better to
4 get it out of the way up front.

5 MR. HOLZHEIMER: Agreed.

6 THE COURT: But at this point, I'm worried about how
7 to get that done without -- I don't like to have a jury
8 waiting around for us to do something.

9 MR. HOLZHEIMER: I understand. I'm just trying to
10 think of this jury, if, you know -- if the case law is clear,
11 and I think it is, the Court needs to make this factual
12 determination. Obviously, it's within the Court's
13 discretion, but giving the jury multiple scenarios, I think,
14 would be very difficult for them.

15 THE COURT: I might have to think this over.

16 Did you want to say anything else about this?

17 MR. KUNZE: Just real briefly, Your Honor.

18 This is from the case that they cite, the Fifth
19 Circuit case regarding the temporary easement, which is not
20 the same thing, here, but citing to Reynolds, the Court held
21 that the district judge should decide the factual question of
22 whether the condemned parcels here are integral and then the
23 judge should then instruct the jury on the issue of just
24 compensation consistent with his preliminary factual
25 determinations. That's how the case that they cited dealt

1 with this issue. The evidence was presented and then the
2 court made an instruction to the jury as to the factual
3 findings that were made. That was done all at trial and
4 that's how it has been done in precedent and there's no case
5 law or directive to have an evidentiary hearing before.

6 Thank you.

7 THE COURT: Let's go to the next.

8 MR. HOLZHEIMER: I believe the last issue, Your
9 Honor, is an issue as to whether or not the temporary
10 easement should come up at trial.

11 So as the Court is aware, we've amended the areas of
12 take. It's been determined that we do not need the temporary
13 easement space. It's never been used. The trees that were
14 on there are still in place and it was determined it would
15 never be used. So the certificate of take was amended and
16 that was filed in accordance with the rules that allow us to
17 amend prior to trial, and that was done. I don't think
18 there's any issue with that.

19 So the temporary easement, Your Honor, is no longer
20 before the jury and it's not part of this condemnation. In
21 the pretrial order, they suggested that they do want to bring
22 up the temporary easement, and they want to bring it up for
23 the period of time that it was part of this lawsuit. I
24 believe they said it's about 16 months or so.

25 Your Honor, one, we don't think it should go before

1 the jury because it is definitely not part of this
2 condemnation. Two, to the extent there's any argument about,
3 Well, you did have it as part of this and did have access to
4 it for 16 months -- Your Honor, both counsel have worked
5 together previously and what we did was we did enter into a
6 stipulation and a payment was made for that stipulation that
7 allowed us to have access to that before the final
8 determination to the jury. The landowners were well
9 compensated for that access. They were paid a large sum of
10 money. What that stipulation was -- and our agreement with
11 them was, We will pay you this money so we can have access
12 and we will pay for the use of the permanent space and the
13 temporary easement space during the pendency of trial. We'll
14 pay you a large sum of money so we can use it until the jury
15 verdict comes in and we get the actual title to the property.
16 Both counsel worked together well and we came up with a
17 number. We paid it to them. So they've been fully
18 compensated for any use of the temporary easement during the
19 pendency of this litigation while it was a part of it. While
20 it was a large sum of money, but to put it in context -- it
21 was a large sum of money for access, but their appraisal is
22 about 280-some dollars -- under \$300. Your Honor, they've
23 been well compensated for 16 months per our stipulation.

24 Alternatively, we've always said we didn't think the
25 jury should ever need to get into the temporary easement and

1 all the issues that come from that --

2 THE COURT: Does the agreement they reached give you
3 immediate access? Did it contemplate to be compensated
4 further for it?

5 MR. HOLZHEIMER: It was without prejudice for them to
6 seek additional compensation.

7 But, Your Honor, their own experts and all their
8 testimony and discovery responses value the temporary space
9 at \$300. Months ago, we said, We'll pay you the \$300; why is
10 this even an issue? Our expert was at 300. I believe their
11 expert was at 287. In order to take one of the issues off,
12 months ago, we offered to pay them the \$300. It wasn't worth
13 the issue for the jury.

14 THE COURT: Okay.

15 MR. HOLZHEIMER: So we think they've been fully
16 compensated.

17 Your Honor, again, if there's an issue, we'll pay
18 them \$300 now, and that was for five years of use. This is
19 not an issue that needs to go to the jury.

20 MR. KUNZE: Your Honor, I think in light of the
21 Court's rulings today on the predicate witnesses and then the
22 noise and vibration, I think if ACP is still willing to
23 stipulate to the \$300, I think that removes this issue from
24 disagreement. So I think we can stipulate, if they're
25 willing to pay the \$300, based on the Court's ruling today.

1 THE COURT: Thank you.

2 Anything else then?

3 There was a motion to exclude Harvey's opinions.

4 MR. KUNZE: We withdraw that based on the Court's
5 ruling earlier as well.

6 THE COURT: I was going to say there's no opinion
7 written, but I decided not to exclude it.

8 Anything else today?

9 MR. KUNZE: I'm not aware of anything else, Your
10 Honor.

11 MR. HOLZHEIMER: No, Your Honor.

12 THE COURT: I'll try to come up with -- I want to get
13 this thing right about what the Court has to decide and what
14 the jury has to decide. I've only tried one of these federal
15 condemnation cases, as I recall -- well, I've tried two, one
16 in Norfolk. But I had a pipeline over in Louisa County.

17 THE CLERK: I think it was Orange.

18 THE COURT: Henry Howell, III.

19 Pretty much, I'm used to trying them the way we did
20 in the state court, but we'll do it the way it has to be
21 done.

22 If you all need to get in touch with me, you can get
23 together and we'll be around.

24 MR. HOLZHEIMER: Thank you, Your Honor.

25 MR. KUNZE: Thank you, Your Honor.

1 THE COURT: Thank you.

2 (Proceedings concluded at 3:12 p.m.)

3
4
5
6
7
8
9
10 "I certify that the foregoing is a correct transcript from
11 the record of proceedings in the above-entitled matter.
12
13

14 /s/Sonia Ferris

July 8, 2019"